The International Law on the Use of Force in light of new developments from the Americas

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Introduction

The first weeks of 2020 have so far proven quite eventful for the international community. After an opening salvo between the U.S. and Iran that prompted profuse debate on the international law on the use of force, in late January Juan Guaidó travelled through Europe to gather international support for his fight against the Maduro regime in Venezuela. The importance of this event for the international law on the use of force can hardly be overstated. Indeed, for the past couple of years, some regional voices in the Western Hemisphere have hinted at the possibility of using force against Venezuela to oust the Maduro regime and restore democracy there. More specifically, there is a recent development that may pose a serious challenge to the UN Charter: the invocation of the 1947 Inter-American Treaty of Reciprocal Assistance ("Tratado Interamericano de Asistencia Recíproca" or "TIAR"), also known as the "Rio Treaty," by a group of American states against Venezuela.

TIAR is a collective defense pact under Article 51 of the UN Charter. It has been ratified by 19 American states (including the United States), and it is considered a forerunner to such arrangements as NATO and the Warsaw Pact. In the case of Venezuela, so far, TIAR's Organ of Consultation has authorized only targeted financial sanctions against the Maduro regime. Yet, Article 8 of the TIAR which, among other things, provides for the use of force as a last resort has been "noted" without qualifications.

Although, Article 53 of the UN Charter provides that "no enforcement action shall be taken under regional arrangements or agencies without the authorization of the Security Council", no reference to that provision was made in the first resolution of said Organ regarding the situation in Venezuela. This post examines whether there is subsequent state practice which could, under the provisions of the Vienna Convention on the Law of Treaties, lead to a new interpretation of Article 53 that would be inconsistent with what is considered a clear text requiring Security Council approval of enforcement action by regional bodies.

From a legal perspective, the invocation of TIAR raises a series of important questions, including the following:

(i) Could the text of the Rio Treaty be used to authorize the use of force against Venezuela? TIAR regulates cases of armed attack, aggression, extra-continental or intra-continental conflict, and any other fact or situation that might endanger the peace of America. These are terms of art that need to be assessed each in its own merits. The legal and political intricacies of this question have already been addressed by some Latin American scholars, including Federica Paddeu, and Pablo Arrocha.

(ii) Is Venezuela a party to TIAR, and why does that matter? Venezuela formally denounced this treaty in 2013. However, in August 2019, Juan Guaidó submitted to the OAS an instrument of ratification of TIAR, which was recognized by that Organization. Henceforth, a peculiar situation arose, whereby the Venezuela ruled by Nicolás Maduro – still recognized by the United Nations as the official government of that country – is not a state party to TIAR, whereas the Venezuela led by Guaidó – recognized by the OAS and over 50 countries as the legitimate government of that country – is a state party to TIAR. The importance of this distinction lies in the fact that, were Venezuela to be considered a party to TIAR, it could be argued that any use of force under that treaty could be based on the consent of that state party, thus rendering the question about regional forcible action under article 53 of the UN Charter moot.

(iii) Could the conduct of certain American states with regards to TIAR be construed as the material element amounting to state practice underlying an emergent rule of customary law? And if so, would such a new regional customary rule be able to successfully challenge the universal customary rules already in place concerning the prohibition on the use of force? This issue has been initially addressed in the commentary to article 53 of the UN Charter in Simma (ed.), *The Charter of the United Nations. A Commentary*, (3rd ed. Vol. II. Chapter VIII, p. 1493).

(iv) Finally, considering that references to the UN Charter in the Rio Treaty are abundant (see for e.g. its preamble, as well as articles 1, 2, 5, 7, and 10 therein), it is worth pondering the question about the role the application of TIAR could have as subsequent state practice with regards to article 53 of the Charter, referring to regional enforcement action. In other words, could this case of state practice outside of the scope of Security Council action lead to a new interpretation that would be inconsistent with what is considered a clear text in article 53? In this post, we would like to focus on this last issue.

Article 53 of the Charter under subsequent practice by TIAR members

In accordance with article 31(3)(b) of the VCLT, any subsequent practice which establishes the agreement of the parties concerning the interpretation of a treaty shall be taken into account together with the context and other elements of interpretation set out in article 31(1). Hence, subsequent practice under article 31(3)(b) of the VCLT was included as an authentic means of interpretation, as it depicts evidence of the understanding of the parties regarding the actual meaning of the treaty after its conclusion.

Could the recent activation of TIAR against Venezuela, and a potential recourse to force authorized by its Organ of Consultation, amount to subsequent practice allowing an interpretation of article 53 which disregards the need for Security Council authorization in case of enforcement action taken under regional arrangements? Or, would it go against the general prohibition on the use of force established under article 2(4) of the UN Charter?

According to article 53, no enforcement action may be undertaken by regional arrangements or agencies without Security Council authorization. Nevertheless, the letter of article 53 does not explicitly require the authorization to be either *prior* or *express*, so it could plausibly be *ex post* and implicit. Thus, it is conceivable, *arguendo*, that a regional arrangement or agency, such as TIAR, may undertake enforcement action without first obtaining Security Council authorization. Further, article 53 does not regulate the hypotheses warranting such enforcement action (unlike article 51, which expressly refers to armed attacks). Therefore, it is also conceivable that a regional arrangement or agency may apply enforcement action in response to humanitarian crises or other situations that may threaten peace in the respective region.

Thereby, TIAR members could argue that they do not need prior Security Council authorization to undertake enforcement action against the Maduro regime in Venezuela in order to address situations such as the ongoing humanitarian crisis and other circumstances that may endanger peace in the Americas – such as the presence of terrorist groups in the country, which has been stressed in the Organ of Consultation's first resolution.

Further, as suggested by Thomas Franck, there is some state practice supporting the view that article 53 has been reinterpreted as to not require *prior* Security Council authorization for regional arrangements to intervene in light of certain crises. Such was the case of ECOWAS action in Liberia and Sierra Leone during the 1990s, which was "commended" by the Security Council only after the intervention took place (Thomas Franck. *Recourse to Force. State Action Against Threats and Armed Attacks.* CUP, 2004, p. 162).

However, there are several problems with this view.

In the first place, it has generally been recognized (Conclusion 7 of the ILC Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties Conclusion – A/73/10, para. 51, 2018) that subsequent practice under the VCLT is to be applied as a means of interpretation, and not as a form of amendment or modification of the same treaty– and arguably as a subsidiary means of interpretation vis-à-vis paragraph 1 of VCLT Art. 31 . Accordingly, an interpretation by TIAR parties freeing them from the need to obtain prior Security Council authorization would directly contravene the content of article 53 of the Charter. Furthermore, subsequent practice of states must not be assessed on a vacuum but taking into account other means of interpretation such as the ordinary meaning, context, object and purpose of the terms of the treaty. Undoubtedly, it is hard to

conceive how an interpretation removing the authorization requirement would not go against the object and purpose of article 53, as well as against its *travaux préparatoires,* taking into account it would strip the Security Council from its monopoly over the use of force.

Secondly, interpretation through subsequent practice requires the parties to a treaty to be in agreement, or to hold a common understanding regarding the provision being interpreted. In this specific case, while the activation of TIAR may be construed as an instance of subsequent practice in relation to article 53, this is an expression of regional practice which does not suffice, nor is uncontested, to be deemed as universal between the members of the mother treaty, i.e. the UN Charter. In particular, the large majority of parties to the UN Charter have not expressed their position regarding this interpretation, nor have they taken part in any regional instance in which this interpretation is being put forward. Thus, while article 31(3)(b) does not require every member state of a treaty to apply a certain interpretation through subsequent practice, common acceptance of such is necessary.

More specifically, in relation to the recent activation of TIAR against Venezuela, some states have already declined or abstained in the resolutions issued by the Organ of Consultation, while other countries in the region have openly rejected its activation, which portrays how challenging it is to reach a common understanding regionally, let alone universally.

Consequently, the main weakness in Franck's thesis is that, as pointed out by Christine Gray, there is simply not enough state practice to ground a reinterpretation of article 53 so as to allow regional arrangements, such as TIAR, to use force without prior Security Council authorization. On the contrary, Gray argues:

> "The more recent practice of the Security Council in expressly authorizing force by ECOWAS in Côte d'Ivoire and Liberia (2003), by the AU in Somalia, Mali, and the CAR, and by the EU in Chad, the DRC, and the CAR may indicate a deliberate reassertion of direct Security Council control of enforcement action". (Christine Gray. *International Law and the Use of Force.* 4th ed. OUP, 2018, p. 444).

The Simma (ed.) Commentary to article 53 of the Charter confirms Gray's assertion about the lack of state practice in the sense proposed by Franck. According to that Commentary, aside from the risk of states gambling to obtain a possible Security Council authorization after using force, the wording of article 53 is quite clear in requiring Security Council authorization for any kind of collective forcible action.

It is worth noting that all the cases cited by Gray belong to the normative context of the Constitutive Act of the African Union, whose article 4(h) poses a serious challenge to the UN Security Council's monopoly of international force, so Gray's assessment should apply *a fortiori* to TIAR, which is much more "UN Charter friendly" on its face.

Concluding remarks

The possibility that subsequent state practice may reinterpret article 53 of the UN Charter has not yet materialized, as the recent application of TIAR in the Americas evidences. However, this could change in the future. Subsequent state practice may develop along the lines of a reinterpretation of the text of article 53, and even as the basis for a new customary rule on the regional use of force. The complexities of such possibilities are appropriately addressed by Dapo Akande and Katie Johnston in their latest exchange on the subject on this blog.

For the time being, we may conclude that any use of force against Venezuela sanctioned by TIAR without Security Council authorization would indeed meet formidable hurdles from a legal perspective to accommodate to the letter and spirit of the UN Charter, unless article 53 is amended as per the UN Charter provisions to the effect.